

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LANGSTER BIRDINE and DEPARTMENT OF THE AIR FORCE,
TINKER AIR FORCE BASE, Oklahoma City, OK

*Docket No. 03-1532; Submitted on the Record;
Issued September 9, 2003*

DECISION and ORDER

Before ALEC J. KOROMILAS, COLLEEN DUFFY KIKO,
DAVID S. GERSON

The issue is whether the Office of Workers' Compensation Programs properly found that the request for reconsideration was untimely filed and did not demonstrate clear evidence of error.

On February 25, 1977 appellant, then a 37-year-old warehouseman, filed a traumatic injury claim alleging that on that date he felt sharp pains in his left elbow and the back of his neck down through the middle of his back when he lifted 86-pound boxes off a conveyor line onto dollies.

The Office accepted appellant's claim for neck, back and left elbow pain.

On July 18, 1985 appellant filed a claim alleging that he sustained a recurrence of disability. By letter dated September 10, 1985, the Office advised appellant to submit medical evidence supportive of his claim.

In a September 18, 1985 response letter, appellant stated that he had already submitted evidence that he wished to have considered by the Office.

By decision dated October 16, 1985, the Office found the evidence of record insufficient to establish that appellant sustained a recurrence of disability causally related to his February 25, 1977 employment injury. Appellant requested reconsideration in an August 7, 1991 letter.

On August 29, 1991 the Office issued a decision denying appellant's request for merit review of his claim on the grounds that he failed to submit additional factual or medical evidence, and thus, it was insufficient to warrant modification of its prior decision. Appellant appealed the Office's decision to the Board.

In a June 25, 1992 decision, the Board affirmed the Office's decision.¹

On January 7, 2002 appellant sought review of an Office decision by the Board. On February 19, 2002 he submitted an Application for Review (Form AB-1) indicating that he was appealing an Office decision dated January 14, 1992.²

By order dated March 19, 2002, the Board dismissed appellant's appeal on the grounds that it did not have jurisdiction over the Office's January 14, 1992 decision.³ In a letter postmarked March 26, 2002 and received by the Board on April 3, 2002, appellant filed a petition for reconsideration.⁴

By order dated August 26, 2002, the Board denied appellant's petition for reconsideration on the grounds that appellant did not establish that the Board's March 19, 2002 order contained an error of fact or law.⁵ In a March 3, 2003 letter, appellant noted the Board's June 25, 1992 decision and stated "I Langster Birdine, disagree with the decision of the Office...." Appellant also stated that he was "appealing" a January 14, 1992 letter from the Board indicating that the Director of the Office decided not to file a pleading in his case.

By decision dated May 20, 2003, the Office denied appellant's request for merit review of his claim on the grounds that it was untimely filed and did not establish clear evidence of error.

The Board finds that the Office properly found that the request for reconsideration was untimely filed and failed to demonstrate clear evidence of error.

The Board's jurisdiction to consider and decide appeals from final decisions of the Office extends only to those final decisions issued within one year prior to the filing of the appeal.⁶ As appellant filed his appeal with the Board on June 6, 2003 the only decision properly before the Board is the Office's May 20, 2003 decision denying his request for reconsideration.

Section 8128(a) of the Federal Employees' Compensation Act⁷ does not entitle a claimant to a review of an Office decision as a matter of right.⁸ The Office, through its regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a). Thus,

¹ Docket No. 92-103 (issued June 25, 1992).

² The Board notes that the record does not contain appellant's January 7, 2002 appeal letter, his February 19, 2002 Form AB-1 or an Office decision dated January 14, 1992.

³ Docket No. 02-434 (issued March 19, 2002).

⁴ The Board notes that the record does not contain appellant's petition for reconsideration.

⁵ Docket No. 02-434 (issued August 26, 2002).

⁶ 20 C.F.R. §§ 501.2(c); 501.3(d)(2); *see John Reese*, 49 ECAB 397, 399 (1998).

⁷ 5 U.S.C. § 8128(a).

⁸ *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

section 10.607(a) of the implementing regulation provides that an application for reconsideration must be sent within one year of the date of the Office decision for which review is sought.⁹

In this case, the Office properly determined that appellant failed to file a timely application for review. In implementing the one-year time limitation, the Office's procedures provide that the one-year time limitation period for requesting reconsideration begins on the date of the original Office decision. However, a right to reconsideration within one year accompanies any subsequent merit decision on the issues.¹⁰

The last merit decision in this case was issued by the Office on October 16, 1985, wherein the Office found the evidence of record insufficient to establish that appellant sustained a recurrence of disability causally related to his February 25, 1977 employment injury. Because appellant's March 3, 2003 request for reconsideration was made outside the one-year time limitation, the Board finds it was untimely filed.

Section 10.607(b) of the Office's implementing regulations states that the Office will consider an untimely application for reconsideration only if it demonstrates clear evidence of error by the Office in its most recent merit decision. The reconsideration request must establish that the Office's decision was, on its face, erroneous.¹¹

To establish clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by the Office.¹² The evidence must be positive, precise and explicit and must manifest on its face that the Office committed an error.¹³ Evidence that does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.¹⁴ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹⁵ This entails a limited review by the Office of how the evidence submitted with the reconsideration request bears on the evidence previously of record and whether the new evidence demonstrates clear error on the part of the Office.¹⁶

To show clear evidence of error, the evidence submitted must be not only of sufficient probative value to create a conflict in medical opinion or establish a clear procedural error, but also of sufficient probative value to *prima facie* shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of the Office decision.¹⁷ The

⁹ 20 C.F.R. § 10.607(a).

¹⁰ *Larry L. Litton*, 44 ECAB 243 (1992).

¹¹ 20 C.F.R. § 10.607(b).

¹² *Nancy Marciano*, 50 ECAB 110, 114 (1998).

¹³ *Leona N. Travis*, 43 ECAB 227, 241 (1991).

¹⁴ *Richard L. Rhodes*, 50 ECAB 259, 264 (1999).

¹⁵ *Leona N. Travis*, *supra* note 13.

¹⁶ *See Nelson T. Thompson*, 43 ECAB 919 (1992).

¹⁷ *Veletta C. Coleman*, 48 ECAB 367, 370 (1997).

Board makes an independent determination of whether a claimant has submitted clear evidence of error on the part of the Office such that the Office abused its discretion in denying a merit review in the face of such evidence.¹⁸

The issue for purposes of establishing clear evidence of error in this case is whether appellant submitted evidence establishing that there was an error in the Office's determination that he failed to establish that he sustained a recurrence of disability causally related to his February 25, 1977 employment injury.

In his March 3, 2003 request for reconsideration, appellant argued that the employing establishment discriminated against him due to his Islamic religion and disability. He stated that he was "appealing" the Board's January 14, 1992 letter. In this letter, the Clerk of the Board advised appellant that the Board had received his case record from the Office and that the Office had elected not to file a pleading in his case which meant that the Office wanted the Board to review the record without any additional argument on its behalf and to issue a final decision.

Appellant's argument and the Board's January 14, 1992 letter do not address whether appellant sustained a recurrence of disability causally related to his February 25, 1977 employment injury, and thus, cannot establish clear evidence of error. Further, the Board's January 14, 1992 letter was informational in nature, and thus, does not constitute a final decision from which appellant may properly appeal.¹⁹ Appellant's March 3, 2003 request for reconsideration does not raise a substantial question as to the correctness of the Office's most recent decision on the merits of his claim for a recurrence of disability.

For these reasons, the Office properly found that appellant's request for reconsideration was untimely filed and failed to establish clear evidence of error.

¹⁸ *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

¹⁹ 20 C.F.R. § 10.126 (1999).

The May 20, 2003 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, DC
September 9, 2003

Alec J. Koromilas
Chairman

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member